

DEVELOPMENT AGREEMENT

This Development Agreement (the “**Agreement**”) is executed as of the _____ day of _____, 2022 (the “**Execution Date**”), by and between **Holladay Property Services Midwest, Inc.**, an Indiana corporation (the “**Developer**”), the **City of Westfield, Indiana** (the “**City**”) and the **Westfield Redevelopment Commission** (the “**Redevelopment Commission**”) on the following terms and conditions:

Recitals

WHEREAS, the Developer has the desire to transform a downtown, urban infill site into a multi-family apartment complex able to provide housing options to new and current residents of the City;

WHEREAS, to combat the increased construction costs associated with urban infill development in a new multi-family market, the Project will require economic development incentives to pay for a portion of the costs of the Project;

WHEREAS, the City and the Redevelopment Commission desire to foster economic development by creating places within the City that will attract residents needed by corporations to fill high wage jobs;

WHEREAS, the City and the Redevelopment Commission have determined that the completion of the Project is in the best interests of the citizens of the City, and therefore, the City and the Redevelopment Commission desire to take certain steps to induce the Developer complete the Project; and

WHEREAS, to facilitate the completion of the Project and the development of the Project Site, the City and the Redevelopment Commission have each agreed, subject to further proceedings as required by law, to contribute to the funding of a portion of the costs of the Project as described herein;

Agreement

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged hereby, the City, the Redevelopment Commission and Developer agree as follows:

1. Defined Terms.

Allocation Area shall mean the Trails Project Allocation Area to be established by the Redevelopment Commission, in accordance with Indiana Code 36-7-14-39, as shown on **Exhibit A** attached hereto, for the purpose of collecting Tax Increment.

Allocation Fund shall mean the Trails Project Allocation Fund established under Indiana Code 36-7-14 for the Tax Increment collected in the Allocation Area.

Ancillary Agreements shall mean all instruments and agreements referenced or contemplated herein, including, without limitation, the Tri-Party Agreement and the Bond Documents.

Annual Fees shall mean fees of the Trustee and expenses related to monitoring the Tax Increment, which fees shall not exceed \$5,000 annually.

Bonds shall mean taxable economic development revenue bonds issued by the City pursuant to Indiana Code 36-7-11.9 and 12, in the aggregate principal amount not to exceed \$4,200,000, including capitalized interest, if any, a debt service reserve, if necessary, and Bond Costs.

Bond Costs shall mean costs of issuance of the Bonds actually incurred directly for or in connection with the issuance of the Bonds, including legal, accounting, consulting and other such services, which costs of issuance shall not exceed \$125,000.

Bond Documents shall mean the documents associated with the issuance of the Bonds.

Bond Proceeds shall mean the proceeds of the Bonds, net of the Bonds Costs, to pay Eligible Costs.

Bond Term shall mean the number of years the Bonds are scheduled to remain outstanding until final maturity, which shall not be more than twenty-five (25) years from the date of issuance of the Bond.

Capital Event shall mean, with respect to the Project, the first to occur of a Refinancing or a Transfer.

Capital Event Closing shall mean the date of the closing of the Capital Event.

Capital Event Notice shall mean a written notice provided by Developer to City and the Redevelopment Commission not less than 45 days prior to the anticipated Capital Event Closing, which shall identify: (a) the Capital Event Closing; (b) the Project Value as determined in connection with that Capital Event; and (c) the amount, if any, of the Capital Event Payment to be made by Developer.

Capital Event Payment shall mean a payment by Developer at the Capital Event Closing to defease all or a portion of the outstanding principal balance of the Bonds as calculated in **Section 4(b)**.

Capital Event Valuation shall mean a Project Value that is in excess of 125% of the Final Project Budget.

City shall mean the City of Westfield, Indiana.

City Bodies shall mean the Common Council of the City, the Redevelopment Commission, the Westfield Economic Development Commission, the Board of Works, or any other Westfield board or entity providing authorization to issue the Bonds.

Claims shall mean claims, liabilities, damages, injuries, losses, liens, costs, and/or expenses (including, without limitation, reasonable attorneys' fees); provided that in no event shall Claims include consequential or punitive damages.

Closing shall mean the closing with respect to the Project Loan.

Closing Date shall mean the date of the Closing.

Cure Period shall mean a period of 30 days after a party failing to perform or observe any other term or condition of this Agreement to be performed or observed by it receives written notice specifying the nature of the default; provided that, if such default is of such a nature that it cannot be remedied within 30 days, despite reasonably diligent efforts, then the 30 day cure period shall be extended as may be reasonably necessary for the defaulting party to remedy the default, so long as the defaulting party: (i) commences to cure the default within the 30 day period; and (ii) diligently pursues such cure to completion; provided that in no event shall a Cure Period extend more than 90 days after the date of the default. Notwithstanding the foregoing, a Cure Period shall not be applicable to a default under **Section 11**, any specific cure periods for such defaults being expressly set forth in **Section 11**.

Eligible Costs shall mean fees, costs, and expenses incurred (or to be incurred) by Developer in connection with the Project, including costs and expenses to: (a) develop and design the Project; (b) prepare the Project Site for construction (including demolition work, earthwork, environmental remediation work, and the extension of utilities); (c) design, relocate, and/or construct infrastructure to support the Project; (d) design,

relocate, and/or install perimeter hardscape and landscape; and (e) acquire the materials to construct the Project.

Event of Default shall have the meaning set forth in **Subsection 11(a)**.

Execution Date shall mean the date set forth in the opening paragraph of this Agreement.

Final Project Budget shall mean the final Project Budget as certified by Developer pursuant to Section 3(c).

Force Majeure shall mean, with respect to the Developer or the City, any cause that is not within the reasonable control of the Developer or the City, respectively (including, without limitation: (a) unusually inclement weather; (b) the unusual unavailability of materials, equipment, services, or labor; (c) utility or energy shortages or acts or omissions of public utility providers; and (d) any shortages or unavailability of financing due to a health epidemic or pandemic).

Laws shall mean all applicable laws, statutes, and/or ordinances, and any applicable governmental or judicial rules, regulations, guidelines, judgments, orders, and/or decrees.

Pledged Tax Increment shall mean 75% of the Tax Increment, minus Annual Fees, pledged by the Redevelopment Commission to the payment of the principal of and interest on the Bonds over the Bond Term.

Pre-Closing Costs shall mean the actual, out-of-pocket expenses directly incurred by Developer prior to the Closing Date in connection with the Project.

Pre-Closing Costs Certification shall mean; (a) a certified statement setting forth the amount of the Pre-Closing Costs on a line-item basis; together with (b) reasonable evidence supporting the amount of the Pre-Closing Costs set forth in the certified statement.

Project shall mean the development and construction of a podium style, multi-family development consisting of approximately 223 units and 330 parking spaces with an estimated construction cost of \$39 million.

Project Budget shall mean the budget for sources of the funding for the construction and development of the Project, including but not limited to: (a) the Project Loan; (b) Developer equity; and (c) the Bond Proceeds; which budget is estimated to be \$43,000,000.

Project Lender shall mean the entity that is providing the Project Loan.

Project Loan shall mean the construction loan or loans and/or other financing in the maximum collective principal amount of \$30,000,000 made by the Project Lender to the Developer (unless Developer otherwise elects to increase such principal amount in Developer's sole discretion), the proceeds of which shall be used to develop the Project (including, without limitation, to: (a) acquire the materials to construct the Project; (b) design and/or construct the Project; and (c) fund other soft costs, fees, and expenses incurred by the Developer in connection with the design and/or construction of the Project.

Project Loan Documents shall mean the documents evidencing the Project Loan.

Project Site shall mean the site depicted on **Exhibit A**.

Project Value shall mean the value of the Project Site and the Project constructed thereon as determined by: (a) the final purchase price in the event of a Transfer; or the (b) calculation of value by the lender during

a Refinancing; which value shall be reduced by the amount of the defeasance costs and expenses incurred as a result of a Capital Event Payment.

Redevelopment Commission shall mean the Westfield Redevelopment Commission.

Refinancing shall mean that the Project Loan is refinanced by Developer; provided that the Refinancing shall provide for, in the sole and absolute discretion of Developer, substantially similar terms, or terms that Developer believes to be market rate for the Project given financial conditions at the time of the Refinancing.

Required Permits shall mean the permits necessary to construct the Project, and which permits include, but are not limited to, permits issued by the City Bodies.

Substantial Completion shall mean the date that the Project receives its certificate of occupancy, or functional equivalent if the City does not issue certificates of occupancy, which date is estimated to be in July, 2024.

Tax Increment shall mean the tax proceeds from the assessed valuation of real property in the Allocation Area in excess of the assessed valuation of real property described in Indiana Code 36-7-14-39(b)(1) allocated and deposited in the Allocation Fund pursuant to the provisions of Indiana Code 36-7-14-39.

Title Company shall mean the title company selected by Developer for the purposes of the closing of the Capital Event.

Transfer shall mean with respect to the Project: (a) any sale or disposition of all or a substantial portion of the Project to a third-party (except for an assignment by Developer as described in **Section 13(b)**); or (b) any other transaction or arrangement that the legal, business, financial, or economic effect of which is substantially the same as a sale, disposition, transaction, or assignment described in clause (a) of this definition; that in the sole and absolute discretion of Developer, is representative of the market value of the Project, given the current and expected future conditions of the: (a) financial markets; and (b) real estate market for multi-family housing in Central Indiana.

Tri-Party Agreement shall mean an agreement by and among the City, the Developer, and the Project Lender pursuant to which the Project Lender agrees to give to the City: (a) notices of defaults by the Developer under the Project Loan Documents; (b) the right (but not obligation) to cure defaults by the Developer under the Project Loan Documents; and (c) the right to purchase the Project Loan in the event of a default by the Developer under this Agreement or the Project Loan Documents if such default is not cured within the Cure Period or other applicable cure period.

Trust Indenture shall mean the trust indenture, dated as of the first day of the month in which the Bonds are issued, between the City and a trustee, pursuant to which the Bonds are issued.

2. City's Obligations.

(a) **Bonds.** City shall cause the issuance of the Bonds, pursuant to Indiana Code 36-7-11.9 and 12 (the "Act"), in accordance with the terms and conditions of this Agreement on or before Closing. The City shall not be obligated to issue the Bonds to fund Eligible Costs until the satisfaction of the condition precedents set forth in (c) of this paragraph 2 are satisfied. The City Bodies will pledge the Pledged Tax Increment to the repayment of the principal and interest on the Bonds, and to the extent the Pledged Tax Increment is insufficient to repay debt service on the Bonds, the City Bodies shall not be obligated to repay the debt service on the Bonds from any other funds of the City or the Redevelopment Commission.

The Bonds shall (1) be issued pursuant to a Trust Indenture, in accordance with the Act; (2) mature not later than 25 years after the delivery date of the Bonds; (3) be issued in an aggregate principal amount not to exceed \$4,200,000, inclusive of amounts to be paid toward capitalized interest and cost of issuance, to yield net proceeds in an estimated amount of \$3,400,000 to pay for or reimburse Eligible Costs; (4) bear a fixed interest rate not to exceed seven percent (7.0%); (5) be subject to optional redemption, on any date, upon fifteen (15) days' notice, in whole or in part, in such order of maturity as the City shall direct and by lot within maturities, at face value, with no premium, plus in each case accrued interest to the date fixed for redemption, with no premium or penalty, as may be further provided in the Trust Indenture; and (6) be payable on February 1 and August 1, solely from Pledged Tax Increment, when and if available. The Bonds may be issued in one or more series and may be structured as draw down bonds with the principal being drawn incrementally as such bonds are purchased by the Developer. The Bonds may be subject to mandatory sinking fund redemption. Payments on the Bonds are payable in lawful money of the United States of America by check mailed or delivered to the registered owners or by wire transfer as provided in the Trust Indenture. In accordance with the Act, the Bonds shall never constitute a general obligation of, an indebtedness of, or a charge against the general credit of the City. The Developer, an affiliate of Developer, or a third-party entity operating at the instruction of Developer shall purchase the Bonds; provided, however, that if the Bonds are purchased by the Lender, the Developer shall provide a corporate or personal guarantee to make principal and interest payments on the Bonds to the extent Pledged Tax Increment is insufficient to make such payments. The Bond Proceeds shall be provided to Developer solely for the purposes of constructing the Project. Bond Costs of the City shall be paid at the time the Bonds are issued and delivered.

(b) Initial Bond Proceeds Disbursement. At any time after the Closing, Developer may receive a disbursement of Bond Proceeds in an amount equal to the respective Developer's Pre-Closing Costs. To obtain the disbursement, Developer shall submit to City a certified statement of the Pre-Closing Costs, together with reasonable supporting evidence. Upon approval by the City, which shall not be unreasonably withheld, the City shall direct the Trustee under the Trust Indenture to disburse Bond Proceeds in the amount set forth in the Pre-Closing Costs Certification to Developer. Any subsequent disbursements of Bond Proceeds shall be approved by the City and disbursed, at the direction of the City, in accordance with the Trust Indenture.

(c) Conditions Precedent to Issuance of Bonds.

(i) The City shall not be obligated to issue the Bonds until the following have occurred:

(A) the requirements of paragraph 2(a) have been satisfied;

(B) the Allocation Area has been established, which shall not be completed until Developer has provided evidence of: (1) an executed purchase agreement for the Project Site; and (2) consent to creation of the Allocation Area by the current owner of the Project Site; to the City;

(C) the Bonds have been authorized by appropriate actions of the City Parties;

(D) the Pledged Tax Increment has been pledged by the Redevelopment Commission to the payment of principal and interest on the Bonds; and

(E) Developer has entered into the Project Loan, which may remain subject to conditions to further funding as imposed by the Project Lender.

(d) The City Bodies shall waive all fees associated with any of the Required Permits.

3. Developer's Obligations.

(a) Project. Subject to the terms and conditions of this Agreement, Developer shall construct the Project by the Substantial Completion Date.

(b) Project Construction. Developer shall perform and construct the Project: (a) in a good and workmanlike manner; and (b) in compliance with the Laws. Prior to commencing a portion of the Project, Developer shall obtain and submit to City for its review the Required Permits for such portion.

(c) Final Project Budget. On the Substantial Completion Date, Developer shall provide the Final Project Budget to City.

4. Capital Event.

(a) Capital Event. Upon the occurrence of a Capital Event, Developer and City shall proceed according to the terms and conditions of this Section.

(b) Capital Event Payment Calculation. Developer shall make the Capital Event Payment at the Capital Event Closing subject to the following conditions:

(i) in the event that the Project Value is in excess of the Capital Event Valuation, the Capital Event Payment shall be in the amount of the outstanding principal balance of the Bonds;

(ii) in the event that the Project Value is: (A) equal to or less than the Capital Event Valuation; and (B) greater than the Final Project Budget; then the Capital Event Payment shall be the lesser of: (aa) the following equation: $(\text{Project Value} - \text{Final Project Budget}) \times 50\% = \text{amount of Capital Event Payment}$; or (bb) the outstanding principal balance of the Bonds. In the event that the Bonds have a principal balance remaining after a Capital Event Payment has been made under this subsection, the Pledged Tax Increment shall thereafter remain pledged to the repayment of the Bonds until fully repaid; and

(iii) in the event that the Project Value is equal to or less than the Final Project Budget, then no Capital Event Payment shall be made and the Pledged Tax Increment Share shall remain pledged to the repayment of the Bonds.

(c) Capital Event Notice. Not less than 30 days prior to a Capital Event, the Developer shall submit a Capital Event Notice to the City. Within 5 days of its receipt of a Capital Event Notice, the City shall notify Developer of City's intent to meet with Developer prior to the Capital Event Closing to discuss the amount of the proposed Capital Event Payment, if any, and the remaining balance of the Bonds. Any subsequent agreement in writing between the City and the Developer regarding the Capital Event Payment, if any, shall replace the respective calculation made under Section 4(b) above.

5. Closing. Subject to the terms and conditions of this Agreement, the Closing shall occur on or before October 1, 2023; with: (i) the Closing Date; and (ii) the location of the Closing; to be established by Developer. At the Closing, the City and the Developer shall have determined the date of issuance and delivery of the Bonds. Developer shall have, at its sole discretion, the option to extend the Closing Date for two periods of 60 days each; provided that, Developer shall provide City with written notice of its intent to extend the Closing Date prior to the occurrence of the existing Closing Date.

6. Closing Documents. At Closing, Developer and City Bodies, as the case may be, shall execute and deliver (or cause to be executed and delivered) the following:

(a) a confirmation by each of Developer and City Bodies of the representations and warranties as set forth in **Section 8**;

(b) the Project Loan Documents;

(c) the Ancillary Agreements;

(d) copies of such resolutions, consents, authorizations, and other evidence as either party or the Title Insurer reasonably may request to establish that: (i) the persons executing and delivering the foregoing documents have been empowered and authorized by all necessary action of Developer and City Bodies, as the case may be; and (ii) the execution and delivery of such documents, and the performance of Developer and City Bodies of its obligations hereunder and under the foregoing documents have been authorized by Developer and City Bodies;

(e) such other customary documents and instruments as either party or the Project Lender may reasonably request in connection with the Closing.

7. Developer Conditions. The obligations of Developer with respect to proceeding with the Closing shall be subject to the satisfaction or waiver in writing of the following on or before the Closing Date, or such other period as specified in this Section:

(a) **Required Permits.** Developer shall have obtained (or determined that it will be able to obtain) all Required Permits.

(b) **Project Loan.** Developer, Redevelopment Commission, and Project Lender shall have agreed on the form and substance of the Tri-Party Agreement, and Developer shall have obtained, in Developer's sole discretion, reasonable financial terms and be closing on the Project Loan.

(c) **Ancillary Documents.** Developer and City Bodies shall have agreed on the form and substance of the Ancillary Documents and shall be executing the Ancillary Documents contemporaneously with the Closing.

(d) **Bonds.** City Bodies shall have issued the Bonds or be issuing the Bonds contemporaneously with the Closing.

8. Representations and Warranties.

(a) **City.** The City represents and warrants to the Developer that: (i) the City shall not enter into any contracts or undertakings that would limit, conflict with, or constitute a breach of this Agreement; (ii) the City is a municipal corporation organized and existing under the laws of the State of Indiana; (iii) subject to completion of the applicable proceedings required by Laws, the City and the Redevelopment Commission each have the power: (A) to enter into this Agreement; and (B) to perform its obligations hereunder; (iv) the City and the Redevelopment Commission have been duly authorized by proper action: (A) to execute and deliver this Agreement; and (B) to perform their respective obligations hereunder; and (v) this Agreement is the legal, valid, and binding obligation of the City and the Redevelopment Commission.

(b) **Developer.** The Developer represents and warrants to the City that: (i) the Developer is an Indiana limited liability company duly existing and validly formed under the laws of the State of Indiana; (ii) the Developer shall not enter into any contracts or undertakings that would limit, conflict with, or constitute a breach of this Agreement; (iii) the Developer has the authority: (A) to enter into this Agreement; and (B) to perform its obligations hereunder; (iv) the Developer duly has been authorized by proper action: (A) to execute and deliver this Agreement; and (B) to perform its obligations hereunder; and (v) this Agreement, when executed and delivered by the duly authorized representative of the Developer, is the legal, valid, and binding obligation of the Developer.

9. Insurance. During the construction of the Project, the Developer shall maintain the policies of insurance described on **Exhibit B**. Each such policy shall: (a) be written by a company reasonably acceptable to City; and (b) provide that it shall not be modified or canceled without written notice to the City at least 30 days in advance (but only to the extent such policy provision or endorsement is commercially available). The policy of general liability insurance required by this Section to be maintained by the Developer shall name the City as an additional insured. The Developer shall deliver to the City certificates of the insurance policies required by this Section, executed by the insurance company or the general agency writing such policies.

10. Ancillary Agreements. As desired by the City, the Tri-Party Agreement shall be executed by the City, the Developer, and the Project Lender to provide the City with the rights as described in this Agreement. The Tri-Party Agreement shall be in form and substance reasonably acceptable to the City and the Lender.

11. Default.

(a) **Events of Default.** It shall be an “**Event of Default**” if either party fails to perform or observe any term or condition of this Agreement to be performed or observed by it, if such default or failure is not cured within the applicable Cure Period. However, it shall not be an Event of Default if: (i) as a result of proceeding conducted under the Indiana Code, authorization to issue the Bonds is not approved by the appropriate City Bodies; or (ii) Pledged Tax Increment is insufficient to pay the principal and interest on the Bonds over the Bond Term.

(b) **General Remedies.** Whenever an Event of Default occurs, the non-defaulting party may take whatever actions at law or in equity are necessary or appropriate to: (i) collect any payments due under this Agreement; (ii) protect the rights granted to the non-defaulting party under this Agreement; (iii) enforce the performance or observance by the defaulting party of any term or condition of this Agreement (including, without limitation, the right to specifically enforce any such term or condition); or (iv) cure, for the account of the defaulting party, any failure of the defaulting party to perform or observe a material term or condition of this Agreement to be performed or observed by it. If the non-defaulting party incurs any costs or expenses in connection with exercising its rights and remedies under, or enforcing, this Agreement, then the defaulting party shall reimburse the non-defaulting party for all such costs and expenses, together with interest at the rate of 12% per annum. Notwithstanding anything to the contrary set forth herein, the City shall exercise its rights under this Subsection subject to the terms of the Tri-Party Agreement.

(c) **No Remedy Exclusive; Limitation.** No right or remedy herein conferred upon, or reserved to, a non-defaulting party is intended to be exclusive of any other available right or remedy, unless otherwise expressly stated; instead, each and every such right or remedy shall be cumulative and in addition to every other right or remedy given under this Agreement or now or hereafter existing at law or in equity. No delay or omission by a non-defaulting party to exercise any right or remedy upon any Event of Default shall impair any such right or remedy, or be construed to be a waiver thereof, and any such right or remedy may be exercised from time to time, and as often as may be deemed to be expedient. To entitle a non-defaulting party to exercise any of its rights or remedies, it shall not be necessary for the non-defaulting party to give

notice to the defaulting party, other than such notice as may be required by this Agreement or by the Laws. In no event shall any party hereunder be liable to the other for punitive or consequential damages as a consequence of an Event of Default by such party. In the event either party hereto employs an attorney in connection with Claims by one party against the other arising from the operation of this Agreement, the non-prevailing party shall pay the prevailing party all reasonable fees and expenses, including reasonable attorneys' fees, incurred in connection with such Claims. The term "prevailing party" as used in this Agreement shall include, but not be limited to, a party who obtains legal counsel or brings an action against the other by reason of the other's breach or default and obtains substantially the relief sought whether by compromise, mediation, settlement, judgment or otherwise.

(d) Injunctive Remedies. The Developer shall be entitled to seek specific performance or injunctive relief, and in each case, the City hereby waives any claim or defense that the Developer has an adequate remedy at law.

(e) No Limitation. Notwithstanding anything to the contrary set forth herein, the rights and remedies set forth in this Section are not exclusive and shall be cumulative and in addition to every other right or remedy given under this Agreement or now or hereafter existing at law or in equity.

12. Mutual Indemnification.

(a) City. To the extent permitted by applicable Laws, the City shall indemnify and hold harmless the Developer from and against any and all Claims arising from or connected with: (i) breaches by the City under contracts to which the City is a party to the extent that such contracts relate to the performance of any work on the Eligible Costs by the City or any party acting by, under, through, or on behalf of the City; (ii) injury to, or death of, persons or loss of, or damage to, property, suffered in connection with performance of any work on the Eligible Costs by the City or any party acting by, under, through, or on behalf of the City; (iii) the negligence or willful misconduct of the City or any party acting by, under, through, or on behalf of the City other than the Developer or any party acting by, under, through, or on behalf of the Developer; or (iv) the breach by the City of any term or condition of this Agreement.

(b) Developer. The Developer shall indemnify and hold harmless City Bodies from and against any and all Claims arising from or connected with: (i) breaches by the Developer under contracts to which Developer is a party, to the extent that such contracts relate to the performance of any work on the Eligible Costs by the Developer or any party acting by, under, through, or on behalf of the Developer; (ii) injury to, or death of, persons or loss of, or damage to, property, suffered in connection with performance of any work on the Eligible Costs by the Developer or any party acting by, under, through, or on behalf of the Developer; (iii) the negligence or willful misconduct of the Developer or any party acting by, under, through, or on behalf of the Developer; or (iv) the breach by the Developer of any term or condition of this Agreement.

Notwithstanding anything to the contrary set forth herein, the obligations of the parties under this Section shall survive the termination of this Agreement.

13. Assignment. Upon Closing, this Agreement shall run with the Project Site and shall be binding on successors in title to the Project Site. Prior to Closing, neither the City nor the Developer shall assign this Agreement without the prior written approval of the other party; provided that: (a) without the prior written approval of the Developer, the City may assign this Agreement to another agency or instrumentality of the City that legally is able to perform the obligations of the City hereunder; and (b) without the prior written approval of the City, the Developer may: (i) assign this Agreement to any entity in which the principals of the Developer: (A) hold a controlling interest; or (B) are members of a joint venture; and (ii) execute and deliver the Project Loan Documents, including, without limitation, a collateral assignment of this Agreement.

14. Notice. Any notice required or permitted to be given by either party to this Agreement shall be in writing, and shall be given (and deemed to have been given) when: (a) delivered in person to the other party; (b) three days after being sent by U.S. Certified Mail, Return Receipt Requested; or (c) the following business day after being sent by national overnight delivery service, with confirmation of receipt, addressed as follows: to the City at 130 Penn Street, Westfield, Indiana 46074, Attn: Mayor with a copy to: Manny Herceg, Taft Stettinius & Hollister LLP, One Indiana Square, Suite 3500, Indianapolis, Indiana 46204, and to the Developer at 227 S. Main Street, Suite 300, South Bend, Indiana 46601, Attn: Chris Wilkes, with a copy to Adam W. Collins, Wallack Somers & Haas, P.C., One Indiana Square, Suite 2300, Indianapolis, Indiana 46204. Either party may change its address for notice from time to time by delivering notice to the other party as provided above.

15. Authority. Each undersigned person executing this Agreement on behalf of the City and the Developer represents and certifies that: (a) he or she has been empowered and authorized by all necessary action of the City and the Developer, respectively, to execute and deliver this Agreement; (b) he or she has full capacity, power, and authority to enter into and carry out this Agreement; and (c) the execution, delivery, and performance of this Agreement duly have been authorized by the City and the Developer, respectively; provided that the City's ability to perform under this Agreement is subject to completion of certain procedures required by Laws which the City agrees to undertake with diligence and in good faith.

16. Force Majeure. Notwithstanding anything to the contrary set forth herein, if either party is delayed in, or prevented from, observing or performing any of its obligations under, or satisfying any term or condition of, this Agreement as a result of Force Majeure, then: (a) the party asserting Force Majeure shall deliver written notice to the other party; (b) such observation, performance, or satisfaction shall be excused for the period of days that such observation, performance, or satisfaction is delayed or prevented; and (c) the deadlines for observation, performance, and satisfaction, as applicable, shall be extended for the same period.

17. Costs and Attorney's Fees. In addition to any other relief to which a party to this Agreement shall be entitled, in the event it is determined by a court of competent jurisdiction that either party has not substantially complied with the terms of this Agreement without sufficient cause, the prevailing party shall be entitled to recover from the other party the costs and reasonable attorney's fees incurred by the prevailing party in seeking: (a) compliance with this Agreement; (b) enforcement of this Agreement; or (c) relief from the other party's failure to substantially comply with any provisions of this Agreement.

18. Miscellaneous. Subject to **Section 13**, this Agreement shall inure to the benefit of, and be binding upon, the City and the Developer, and their respective successors and assigns. This Agreement may be signed in one or more counterparts, each of which shall constitute one and the same instrument. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Indiana. All proceedings arising in connection with this Agreement shall be tried and litigated only in the state courts in Hamilton County, Indiana, or the federal courts with venue that includes Hamilton County, Indiana. This Agreement may be modified only by a written agreement signed by both the City and the Developer. The invalidity, illegality, or unenforceability of any one or more of the terms and conditions of this Agreement shall not affect the validity, legality, or enforceability of the remaining terms and conditions hereof. All Exhibits to this Agreement are attached hereto and incorporated herein by reference. Time is of the essence in this Agreement. If any provision of this Agreement or application to any party or circumstances shall be determined by any court of competent jurisdiction to be invalid and unenforceable to any extent, then the remainder of this Agreement or the application of such provision to such person or circumstances, other than those as to which it is so determined invalid or unenforceable, shall not be affected thereby, and each provision hereof shall be valid and shall be enforced to the fullest extent permitted by law; provided that, in lieu of such invalid or unenforceable provision, there will be added to this Agreement a provision as similar to the invalid or unenforceable provision as is possible to reflect the intent of the parties and still be

valid and enforceable. The captions in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope of this Agreement or the scope or content of any of its provisions. Nothing contained in this Agreement shall be construed to create a partnership or joint venture between the Developer and the City or their successors in interest. Unless otherwise specified, in computing any period of time described herein, the day of the act or event after which the designated period of time begins to run is not to be included and the last day of the period so computed is to be included, unless such last day is a Saturday, Sunday or legal holiday for national banks in the location where the Project Site is located, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or legal holiday.

[Signature page to follow.]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Execution Date.

CITY

City of Westfield, Indiana

By: _____

Printed: J. Andrew Cook

Title: Mayor

**WESTFIELD REDEVELOPMENT
COMMISSION**

By: _____

Joseph Plankis, its President

DEVELOPER

**HOLLADAY PROPERTY SERVICES
MIDWEST, INC.**

By: _____

Printed: _____

Title: _____

EXHIBIT A

Project Site

Parcel No.'s

08-09-01-00-04-004.000

08-09-01-00-04-004.001

Map (see attached)

EXHIBIT B

Insurance

Developer shall maintain the following policies of insurance related to the Project Site:

- (a) Commercial general liability insurance with a policy limits of not less than \$500,000 per occurrence and \$2,000,000 in the aggregate for both bodily injury and property damage;
- (b) Automobile liability insurance with policy limits of not less than \$100,000 per accident; and
- (c) Worker's Compensation at statutory limits.